No. 80-323

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Statement

The reasoning of the Government's *amicus* brief supports the grant of certiorari—indeed, summary reversal—even though its conclusion urges a denial of the petition. If anything, this ambivalence, and the tactic it reflects, more sharply demonstrate the need for review than would a straightforward, principled position.

The Government told the court of appeals that, notwithstanding the right of ASCAP members to engage in direct licensing and the feasibility of such dealings—what the Government refers to as the "right of independent action" (Br. 10, 11 & n.13)—defendants' practice had "factually undisputed anticompetitive characteristics" that represented "substantial deviations from the competitive norm," and that it would be an error to fail to recognize as well "the economic barriers to direct dealing which the blanket license and its concomitant disinclination effect produce" (H15, 17).

Despite this advice, the linchpin of the court of appeals' decision, as the Government now acknowledges, is an "equation" that is wholly novel to Section 1—*viz*, that the right of independent action *equals* no restraint.[1]

The Government plainly disagrees that the "right of independent action" has any such restraint-removing effect. It then draws the following conclusion:

> "Of course, if the court of appeals intended to establish a rule of general applicability on this point, its decision would be clearly wrong and appropriately subject to summary reversal." Br. 11 n.13.

It is rare to confront a statement in a Government brief that is at once so revealing and preposterous.

1. It is preposterous because the court of appeals' decision in question has as much *inherent* "applicability" or "inapplicability"—and is as much entitled to the force of *stare decisis*—as any other decision of a court of competent jurisdiction. It is, at minimum, the law of the Second Circuit. But it is also already being heralded by sophisticated antitrust advisors throughout the land as, in effect, the greatest potential escape-hatch from Section 1 liability that has yet been judicially conceived.[2]

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[1] As the Government states the holding: "The court of appeals has held that respondents' blanket licensing scheme has no anticompetitive effect because petitioner could readily seek to deal directly with individual copyright owners" (Br. 7).

[2] For example, Lester Bridgeman, a prominent ICC attorney from Washington, D.C., recently addressed the 51st Annual Meeting of the Association of ICC Practitioners, telling them, on the basis of *ASCAP*, that the key difference between the facts involved in prior rate-bureau antitrust litigation and current practice was that in the past

> "There was *no right of independent action!* The implication was that if there *were* a right of independent action the mere fact that members got together to discuss rates would not, in itself, violate the anti-trust laws." *Do the Antitrust Laws Provide a Feasible Alternative to Regulation, reprinted in* 47 ICC Practitioners' J. 673, 691 (1980) (emphasis in the original).

At the same conference, another antitrust attorney, Eugene Crew, advised the assemblage:

> "The *ASCAP* case contains a positive message for all carriers and their rate bureaus: they may publish common tariffs without fear

Had the Government been the plaintiff in this case, there can be little doubt that it would now be proclaiming, on its own petition, the insidiousness of this precedent. For what the Government apparently means by a rule of "general applicability" is a rule that applies to the Government. This one does so on its face, but precisely because it is so extreme and potentially dangerous, the Government tries to avoid that result by "hedging its bets" on this petition.

2. In that regard, the above-quoted Government statement is revealing because it discloses that the Government *knows* the decision below is "clearly wrong"; *knows* it is "appropriately subject to summary reversal"; but nevertheless wishes somehow to make it appear that the Government should not be tarred with that brush, should this writ be denied.

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of antitrust sanctions, provided they do not agree to refrain from competing with each other." *Id.* at 677.

As Mr. Crew further emphasized:

> "merely substitute 'rate bureau' for 'ASCAP' and 'trucking service' for 'musical composition' and 'tariff' for 'license' and you will see my point." *Id.*

In a regularly featured article in the New York Law Journal, Harold Brown, writing of the impact of the court of appeals' decision on franchising operations, stated that "in spite of horizontal pricing implications," the court held that the

> "availability of direct licensing of copyrighted music prevents blanket licensing from being illegal restraint, thus precluding need to balance effect on interbrand and intrabrand competition." Brown, *Franchising*, N.Y.L.J., Jan. 13, 1981, at 1, col. 1, 26 nn. 15 & 16.

Mr. Brown then concluded that while the rule of reason "usually meant a balancing" process,

> "Such balancing is unnecessary, however, if the business arrangement establishes freedom of choice rather [than] any restraint. Such a ruling was made [by the court of appeals] in the *ASCAP* case where the availability of licensing for individual copyright avoided any need to balance the competitive effect of blanket licensing for all copyrighted music." *Id.* at 26.

See also, e.g., Axinn, *Antitrust Update 1980*, 1 Legal Notes & Viewpoints Q. 1, 27 (1980); Note, *Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act*, 55 Notre Dame L. 729, 750 n.169 (1980).

For if certiorari were not to be granted (which, in any suit, is statistically probable), and the Government were to have supported its grant, the Government's position—necessarily, that denial would impede antitrust enforcement—would more likely become, in the Government's mind, a self-fulfilling prophecy.

Given its recognition of the startling error below, the Government should now be urging summary reversal, as it says it would do if the decision had "general applicability" (Br. 11 n.13). When the Government attempts to explain, however, why this ruling of law is *not* "generally applicable"—that is, why it should never apply to the Government—the very absurdity of the grounds advanced for that view serves further to suggest the hypocrisy of the Government position.

3. For its first ground, the Government suggests that the court of appeals' error was somehow procured—and is thus somehow stripped of "general applicability"—by what the Government terms *CBS's "own* strategy" to "focus" the trial "on the issue of compulsion" (Br. 9, emphasis added).

This is a deplorably inaccurate rewriting of clear record facts, for it was defendants, over our objection, who prevailed upon the district court to inject an element of "compulsion" into our price-fixing claim;[3] but, more importantly, it was *not* the court of appeals' under-

[3] At defendants' insistence, and over our objection, the district court, in formulating its pre-trial order of June 12, 1972, defined "compulsion" as the primary issue for trial—*i.e.*, whether CBS was "compelled" to take a blanket license (E16). We maintained that while "compulsion" was an element of tying, it was categorically *not* an element of price-fixing, and that literal price-fixing (whether judged by *per se* or rule-of-reason standards) was CBS's central claim in this suit. (ASCAP, certainly, did not harbor the slightest confusion about the centrality of the price-fixing claim to this case, despite the Government's evident confusion to the contrary (Br. 8-9). As ASCAP had already acknowledged in its motion for summary judgment:

> "CBS' *major* antitrust attack upon ASCAP is the claim that ASCAP 'fixes prices.'" (JA 189, emphasis added).)

In fact, so strenuously and repeatedly did CBS attack the "compulsion" feature of the pre-trial order which *defendants* had procured that

standing, and has nothing whatever to do with the "applicability" of the decision.

The court of appeals stated in so many words that this burden of proving "compulsion" was "*placed*" upon CBS by Judge Lasker, "for he concluded that there was no restraint of trade if direct licensing was feasible" (*i.e.*, if the "right of independent action" were preserved) (A14, emphasis added).

How, then, could the court of appeals be viewed as having been misled into (what the Government euphemistically calls) this "*unduly narrow* focus on the issue of economic compulsion" by believing that CBS had voluntarily assumed this burden of proof (Br. 8, emphasis added). The court acknowledged exactly the opposite.

4. Another Government rationalization is that "[n]othing in the decision of the court of appeals suggests that the right of independent action would save typical price-fixing" from condemnation (Br. 10-11). But this begs the question.

The court of appeals states a ground on which literal price-fixing need no longer be "typical." Any collective or other horizontal scheme could be fashioned saliently to preserve the "right of independent action." And the Government obviously understands, but here elides, that "nothing" in this decision "suggests" that it should *not* be applicable to such arrangements.[4]

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defendants complained to the court about our relitigation of the issue: *e.g.*:

> "CBS quotes a portion of this Court's earlier opinion denying a motion for summary judgment as if to say that there is no issue in this action as to whether CBS has been 'compelled' in restraint of trade and that the only issue is whether the system proposed by CBS can function 'on a more competitive basis.'
>
> "This is an argument which was advanced by CBS in pre-trial conference prior to the framing of the Court's order of June 12 [1972]. CBS' argument was rejected then, and is entitled no greater consideration now." (JA 382, citation omitted).

[4] Indeed, it is difficult to see how a criminal indictment could be prosecuted against defendants who expressly relied on a decision of the Second Circuit Court of Appeals by specifically preserving their "right of independent action."

Moreover, there is considerable reason to believe, given the reaction of antitrust advisors, that it will significantly increase risk-taking, and complicate antitrust enforcement, not only in the numbers of practices that must be investigated, but in the ability of complainants to obtain preliminary injunctions and summary judgments.

5. The Government also implies that the "separate product" concept articulated by this Court somehow contributed to the court of appeals' decision (Br. 10). Logically, however, there are only two respects in which a blanket license can be deemed a "separate product"—one of which is wholly irrelevant to the "applicability" of the court of appeals' decision, and the other, the very antithesis of the factual premises of that decision.

Thus, a product may be "separate" merely in that, to use the Government's terms, it "is distinct from the product potentially offered by individual [sellers]" (Br. 10). This condition *always obtains* when competing sellers combine to pool their goods. Absent the combination, no individual seller could offer the goods of his competitors; nor could a joint sales agency for the combination sell the pooled goods at prices set by the agency.

That, of course, is not an excuse for the combination; it is the method by which the combination restrains competition. *See Citizen Publishing Co. v. United States*, 394 U.S. 131, 134-36 (1969); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951).

The other respect in which a pooled product can be deemed "separate" is where, without the pool, there would be no functioning market—at least in the sense the Sherman Act envisions. That condition can result when individual sellers "are inherently unable to compete fully effectively" (C23); economically, it does create a "separate" or "different" product; and, legally, it justifies that form of pooling which constitutes the least restrictive alternative.

Certainly, however, the court of appeals did not rest

its decision on this ground, but on the very opposite conclusion that direct dealings were entirely feasible.

6. The other reason the Government says that this ruling of law will not be followed by any other court is that it arises out of the "unique nature of the market" (Br. 9).

If "unique" market facts had been cited by the court of appeals as factors *justifying* the restraint, the court would at least have performed the analysis (albeit, erroneously) that this Court directed, and the Government might have a colorable position.

But the bold fact is that the court of appeals did not find anything to *justify* the restraint. The court of appeals held there was "no restraint" whatever (*e.g.*, A12, 14); and that holding was no more based on any circumstances "unique" to this market than it was on purported "litigation strategies." The holding of "no restraint" was linked solely and directly to the right of independent action.

To have predicated a holding in this case on "unique" market circumstances would have required the courts below to have made a finding diametrically opposed to the findings they did, in fact, make.

For to base a holding on market conditions would have required the courts below to find that the network market was one in which individual sellers "are inherently unable to compete fully effectively"(C23)—whereas, in point of fact, the courts below found that this market was one in which individual sellers *could* "compete fully effectively," because the courts below found that direct licensing was "feasible" (both courts), and "convenient" and "efficient" (the district court)(A12, 14, 18; E40, 55).

In short, the courts below found that the network market *was no different in these respects from any other*, which makes the holding of this case—right of independent action *equals* no restraint—"generally applicable" to every market in the United States.

That is what the Government *knows*; that is what the Government fears; and that is why the Government has

chosen disingenuously to drape this decision with "Emperor's Clothes" rather than to confront head-on the dangerous error it so plainly contains.[5]

We submit that the Department of Justice would be perfectly delighted if both certiorari and summary reversal were granted, so long as it does not have to risk being counted as favoring either proposition. That is hardly courageous or good policy—but that is nonetheless what the Department is saying in this case.

7. One final point warrants brief mention.

To the court of appeals, CBS must be taking a blanket license as a matter of "preference" (A11)—despite the fact that it has prosecuted this suit for many years to enjoin blanket licensing in this market; despite the fact that it could not get competitive prices by direct dealing so long as the blanket license remained in effect; and despite the fact that its licenses from defendants have been *interim* only, taken under protest, and subject to retroactive adjustment in the light of the result of this case. For to the court of appeals, the purported "preference" is established by the fact that CBS has not availed itself of the ASCAP members' "right of independent action."

The Government cites this point as if it might actually be a separate, contributing ground for the decision (Br. 10 n.12), although the Government must recognize that it is simply a bootstrap conclusion from the "right of independent action" itself.

In fact, this conclusion converts a buyer's interim dealings with a consortium into what, in reality, constitutes a consortium defense of *pari delicto*, previously rejected by this Court in *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968). To a Government Department not quite so bent on pursuing an unwise tactical course, the resurrection of such a defense in this extreme form would itself be worthy of review.

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[5] Notably, the Government is silent as to the first ground of our petition: that the decision below defies the mandate of this Court.

Conclusion

For the reasons stated herein, and in our petition and reply brief, the petition for a writ of certiorari should be granted, and the ruling of law from which it is taken, summarily reversed.

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